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In Their Native Lands: The Legal Status of American Indian Children in North Dakota

B. J. Jones

IN THEIR NATIVE LANDS: THE LEGAL STATUS OF AMERICAN INDIAN CHILDREN IN NORTH DAKOTA

B.J. JONES*

I. INTRODUCTION

American Indian[1] children in North Dakota shoulder a unique legal status. They are citizens of three separate political entities: the United States, the state of North Dakota, and the Indian tribe[2] to which they belong.[3] Because the Indian tribes to which they belong maintain a distinctive political relationship with the United States government,[4] American Indian children are often the subject of discrete federal laws that apply only to Indian people. Yet, as North Dakota citizens, they are in theory entitled to the same privileges and protections under state law as non-Indian children, especially with regard to the various programs operated by state and county governments pursuant to federal mandates. When Indian children reside on one of the five Indian reservations in the state, another layer of law–tribal law–may determine their rights and obligations.

This article attempts to analyze the various federal, state and tribal laws that apply to Indian children in North Dakota in the areas of child welfare, child protection, health care, and child support enforcement. American Indian children have been, and remain today, the targets of a mishmash of statutory and regulatory laws that attempt at once to

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* Director, Northern Plains Tribal Judicial Institute, University of North Dakota School of Law; Chief Judge, Sisseton-Wahpeton Sioux Tribal Court; Chief Justice, Turtle Mountain Chippewa Tribal Court; J.D., University of Virginia, 1984.

1. The term "American Indian" is used throughout this article as a reference to the native inhabitants of what is now the United States. It is not a term of ethnic description, nor is it a term native people use as a basis for self-identification. It has managed, however, to survive as the most common legal term of reference for Native Americans and will thus be utilized herein.

2. At present there are over 500 nations recognized by the United States government as separate "Indian tribes" with whom the United States maintains a special relationship. These tribes are located throughout the continental United States and Alaska. There are five Indian tribes with Indian trust land located in the state of North Dakota: the Standing Rock Sioux Tribe, the Spirit Lake Nation, the Three Affiliated Tribes, the Turtle Mountain Band of Chippewa, and the Sisseton-Wahpeton Sioux Tribe.

3. To belong to an Indian tribe generally connotes being a member of that tribe. Most Indian tribes determine membership by a process of enrollment whereby one must demonstrate that she meets the various requirements of membership, including a blood quantum requirement. Other tribes do not have an enrollment requirement and determine membership by lineal descendency. There is no one generally-accepted definition of an "Indian," although it is generally acknowledged that Indian tribes have the inherent authority to determine their own membership and that determination is generally binding on other entities. *See* United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979).

4. The United States Supreme Court has recognized that the federal government maintains a "political" relationship with Indian tribes because they are distinct political entities. *See* Morton v. Mancari, 417 U.S. 535, 551-52 (1974).

preserve their unique cultural identities while recognizing their rights to the basic staples of life. Unfortunately, as this article will demonstrate, Indian children domiciled on Indian reservations have often been deprived of the benefits Congress intended to bestow upon all children by enactment of the various titles of the Social Security Act just because of their triad citizenship.

Part II of this article encompasses a background discussion of American Indian children and the laws that apply to them. The next several sections focus on specific examples of these laws: Part III focuses on Indian children's status in the foster care system; Part IV discusses health care for Indian children; and Part V concludes the article with a review of child support enforcement as it relates to Indian children.

II. OVERVIEW OF AMERICAN INDIAN CHILDREN AND THE LAW

A proper examination of the legal station of American Indian children requires the reader to gain an appreciation of the present status of Indian people in this country and state and an understanding of the fundamental tenets of law underlying the relationship between Indian tribes and the federal government. The American Indian population in North Dakota is the youngest of all ethnic groups in the state.[5] With almost half of the population of each of the North Dakota Indian reservations under age 19, the rule of law applicable to American Indians in the state is predominately an examination of the treatment of the young.[6] This article attempts to evaluate how that rule of law has performed in the improvement of the lives of Indian children in North Dakota. Assessing that effectiveness is not merely an inspection of the statistics commonly recited to appraise the successes and failures of policy directed toward children; it also entails an inquiry into whether that rule of law consummates the unique promises made to native people by the United States government.

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5. *See* INDIAN HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, TRENDS IN INDIAN HEALTH 4 (1996). That report found that the median age for Indian persons is 24.2, compared to 32.9 years for all races. Additionally, 33% of all Indians are younger than 15 years of age. In North Dakota in 1994, 49.8% of all Indian persons in the state were 19 years of age or younger. *See* INDIAN/NONINDIAN COMPARISONS: BY SEVERAL DEMOGRAPHIC, PROGRAM AND HEALTH VARIABLES, A REPORT FROM THE NORTH DAKOTA DEPARTMENT OF HUMAN SERVICES AND STATISTICS 2 (1997) [hereinafter NORTH DAKOTA REPORT].

6. *See* NORTH DAKOTA REPORT, *supra* note 5, at 2.

A. STATISTICAL OVERVIEW OF AMERICAN INDIAN CHILDREN

There are over 557 Indian tribes, bands and nations recognized by the United States government as distinct political entities.[7] Five of those separate nations exist, either wholly or partially, within the boundaries of the state of North Dakota, and did so prior to the incorporation of North Dakota into the United States.[8] Three, the Spirit Lake Nation, the Three Affiliated Tribes of the Fort Berthold reservation, and the Turtle Mountain Band of Chippewa, exist wholly within the state, while the other two, the Standing Rock Sioux Indian reservation and the Lake Traverse reservation, also extend into the state of South Dakota. Both the Standing Rock and Fort Berthold reservations are quite expansive, with territory covering hundreds of thousands of acres in North Dakota, while the Turtle Mountain and Lake Traverse reservations are of fairly modest size. The Lake Traverse reservation is essentially the Dakota Magic Casino south of Fargo, North Dakota.

According to the 1990 census, 1.959 million persons, or eight-tenths of one percent of the total population of the country, identified themselves as American Indian or Alaskan native.[9] This is a substantial increase from the 1980 census and reflects that the Indian birth rate is higher than other ethnic groups.[10] It may also reflect a tendency of persons to identify themselves as native, notwithstanding their lack of ties to Indian tribes. This number also constitutes far more persons than are recognized by Indian tribes as their members.[11] North Dakota has similarly discerned a substantial increase in its Indian population: From 1990 to 1994, the Indian population increased from 25,306 to 27,363, an 8.1 percent increase, while the non-Indian population dropped 0.4 percent.[12]

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7. Each year the Department of Interior publishes a list of Indian tribes and Alaskan native villages and corporations eligible for services from that federal agency. There are other Indian tribes that are recognized by state governments but not by the Department of Interior. For purposes of discussion herein, the term Indian tribe will apply to those tribes, Indian nations and Alaskan native corporations and villages eligible for services from the Department of Interior.

8. When the state of North Dakota was admitted to the union, it was required, as an express condition of admission to the union, to disclaim in its constitution all jurisdiction over the Indian reservations in the state. That disclaimer is found in North Dakota's enabling act and its constitution. *See* N.D. CONST. art. XIII, §1. The North Dakota Supreme Court has found that the state courts cannot exercise civil jurisdiction over claims brought against reservation-domiciled Indians because of that constitutional prohibition. *See* White Eagle v. Dorgan, 209 N.W.2d 621, 623 (N.D. 1973).

9. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 13 (4th ed. 1998) [hereinafter FEDERAL INDIAN LAW CASEBOOK].

10. *Id.*

11. *Id.* at 12-13.

12. *See* NORTH DAKOTA REPORT, *supra* note 5, at 2.

60.4 percent of the Indian population in North Dakota resides on one of the state's reservations, while the majority of the remainder resides in the larger cities in the state.[13] Nationally, nearly half of all Indian persons reside on or adjacent to Indian reservations, while the other half predominately reside in large urban areas. Much of the body of law referred to as "Indian law" does not implicate those Indian persons not residing within tribal jurisdiction, yet as this article demonstrates, in the area of Indian law affecting the young, there are many common denominators spanning this reservation-urban breach.[14]

Not only is the Indian population growing, but it is also getting younger. The median age for Indians nationally is 24.2 years, compared to 32.9 years for all races.[15] Thirty-three percent of all Indians are younger than fifteen years of age, compared to twenty-two percent for the general population.[16] Indians are generally thought to be the most impoverished minority in the United States: Thirty-one percent live below the poverty line, and the annual per capita income of $8,300 for Indians is the lowest of all minorities in the country.[17] On certain Indian reservations, the unemployment rate equals or exceeds forty-five percent, a figure reflective of both the abject poverty on many reservations and the strikingly young population of many Indian reservations, where the young often constitute the majority population.[18] North Dakota shares this nationwide trend in poverty among Indian families, with fifty-eight percent of Indian persons residing in homes with income of less than $15,000 and 19.2 percent living in homes that had an annual income of less than $5,000.[19] According to the 1990 census, nearly one-half of North Dakota Indian families had incomes below the poverty level and a majority of Indian children in North Dakota 1989 resided in homes that were below the poverty level.[20]

Statistics for North Dakota also reflect the relative youth of the American Indian population. In 1990, 48.3 percent of the Indian population was nineteen years of age or younger, compared to 29 percent of the non-Indian population.[21] By 1994, the percentage of

13. *See* NORTH DAKOTA REPORT, *supra* note 5, at 2.

14. For example, the Indian Child Welfare Act (hereinafter "ICWA"), is a federal statute designed to apply primarily to Indian children residing outside of Indian country. *See* ICWA, 25 U.S.C. § 1901 (1994). In addition, many of the federal laws and regulations that govern Indian health care for the young also impact the urban Indian population because Indian Health clinics exist in many urban areas.

15. *See* INDIAN HEALTH SERVICE, *supra* note 5, at 4.

16. *See* INDIAN HEALTH SERVICE, *supra* note 5, at 4.

17. *See* FEDERAL INDIAN LAW CASEBOOK, *supra* note 9, at 15.

18. FEDERAL INDIAN LAW CASEBOOK, *supra* note 9, at 15.

19. NORTH DAKOTA REPORT, *supra* note 5, at 4-5.

20. NORTH DAKOTA REPORT, *supra* note 5, at 4-5.

21. NORTH DAKOTA REPORT, *supra* note 5, at 2.

young people had increased to 49.8 percent, a marked increase of 11.3 percent.[22] The fact that the majority or near majority of the Indian population in North Dakota is now less than nineteen years of age makes the status of the law pertinent to Indian youth particularly of import in the state.

Indian children in North Dakota are also much more likely than other children to reside in single-parent homes.[23] In 1990, 24 percent of Indian households were headed by a mother with children and no father present, and 6 percent were headed by a father with children and no mother present.[24] Contrarily, only 4.1 percent of non-Indian families were headed by a single mother, and only 1.0 percent were headed by a single father.[25] 85.9 percent of the households headed by single Indian mothers with children less than five years of age lived in poverty in 1989, as did 62.6 percent of similar households with children between the ages of six and eighteen.[26] This is compared to 63.3 percent of non-Indian families.[27] Of the households headed by single Indian fathers, 66.2 percent with children under age five were mired in poverty, as were 54.9 percent of those with older children.[28]

In light of these demographics regarding the tendency of Indian children to live in single-family homes and the relative lack of employment opportunities on Indian reservations, it is not surprising that Indian children are disproportionately represented as federal and state entitlement recipients. In 1996, 42.3 percent of Aid to Families with Dependent Children (AFDC)[29] recipients in North Dakota were American Indian.[30] In 1994, 38.1 percent of Indians in North Dakota were eligible for AFDC, compared to only 2.9 percent of non-Indian families.[31] 24.5 percent of food stamp recipients in North Dakota in 1996 were Indian,

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22. NORTH DAKOTA REPORT, *supra* note 5, at 2.
23. NORTH DAKOTA REPORT, *supra* note 5, at 3.
24. NORTH DAKOTA REPORT, *supra* note 5, at 3.
25. NORTH DAKOTA REPORT, *supra* note 5, at 3.
26. NORTH DAKOTA REPORT, *supra* note 5, at 4-5.
27. NORTH DAKOTA REPORT, *supra* note 5, at 4-5.
28. NORTH DAKOTA REPORT, *supra* note 5, at 4-5.
29. This program is now called Temporary Assistance for Needy Families (TANF) as the result of the Personal Responsibility & Work Opportunity Reconciliation Act of 1996, in which the federal government block-granted the AFDC program to state governments and now allows them to operate those programs virtually free of federal control. *See* Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at scattered sections of 42 U.S.C.). That law also permits Indian tribes to operate their own TANF programs with direct federal grants. *Id.* Efforts by North Dakota Indian tribes to do so, however, have been impeded by the state's refusal to provide matching funds necessary to run the program. Some states have agreed to provide the state portion of the operating costs to Indian tribes that wish to run the program, while other tribes, such as the Sisseton-Wahpeton Sioux Tribe, operate the program without the state match.
30. NORTH DAKOTA REPORT, *supra* note 5, at 6.
31. NORTH DAKOTA REPORT, *supra* note 5, at 6.

and a total of 59.5 percent of the Indian population in North Dakota in 1994 was eligible for food stamp benefits.[32] Indian children are also much more likely to receive medical assistance benefits from the state under Title XIX of the Social Security Act. In 1996, 21.6 percent of the medical assistance recipients in North Dakota were Indian.[33] Further, 53.7 percent of Indians were eligible for medical assistance in 1994, compared to only 8.7 percent of the non-Indian population.[34]

Indian children in North Dakota are also much more likely to be placed in foster or substitute care. In 1994, 34.1 percent of children in state-subsidized care were Indian,[35] a statistic which may be even higher if tribally-subsidized and Bureau of Indian Affairs' subsidized homes are considered.[36] Since American Indians do not exceed four percent of the state's total population, this is a rather alarming statistic: An Indian child in North Dakota is over eight times more likely to be placed in foster care than a non-Indian child.[37] Congress frequently cited such disproportionate statistics on foster care placement twenty years ago when it enacted the Indian Child Welfare Act (ICWA), an attempt to ameliorate the high removal rates of Indian children from their homes.[38] Current statistics indicate that ICWA has done little to derail the growing number of Indian children in substitute care in North Dakota, a topic discussed further in Part III of this article.

One area in which the lives of Indian people have greatly improved is the infant mortality rate. In 1955, 62.7 of 1,000 Indian children born died at birth or shortly thereafter. That rate has now decreased to 8.8 per 1,000, which, although still higher than the national average, reflects a striking improvement.[39] In education the statistics are also positive: Five hundred thousand American Indian children attend preschool, elementary or high school.[40] Ten percent attend Bureau of Indian

32. NORTH DAKOTA REPORT, *supra* note 5, at 6-7.
33. NORTH DAKOTA REPORT, *supra* note 5, at 7.
34. NORTH DAKOTA REPORT, *supra* note 5, at 7.
35. NORTH DAKOTA REPORT, *supra* note 5, at 7.
36. In North Dakota, a variety of resources are utilized to fund foster care and adoptive placements of Indian children. The most commonly-utilized, Title IV-E of the Social Security Act, can only pay for placements made by state courts or by tribal courts if a state-tribal cooperative agreement exists and the tribal court complies with the criteria found in Title IV-E. At present, all of the Indian tribes in North Dakota have some form of a cooperative agreement with the state to finance certain foster care and adoptive placements. The Bureau of Indian Affairs and tribes also fund certain foster care placements in cases where the placements are not eligible for Title IV-E. This is discussed further in Part III of this article.
37. NORTH DAKOTA REPORT, *supra* note 5, at 7.
38. *See* H.R. REP. No 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531 (revealing that prior to ICWA the removal rate of Indian children was as high as nineteen times greater than for non-Indian children).
39. FEDERAL INDIAN LAW CASEBOOK, *supra* note 9, at 17.
40. FEDERAL INDIAN LAW CASEBOOK, *supra* note 9, at 18.

Affairs schools, while the others attend schools operated by states, Indian tribes or private schools. The ten percent of Indian children who attend BIA boarding schools is a striking decline from earlier in this century, when a majority of Indian children attended boarding schools operated either by the BIA or various Christian sects.[41]

Taken as a whole, the foregoing statistics reveal one portentous conclusion for Indian children in North Dakota: Their survival and future prosperity depends on a fair and equitable application of state and federal entitlements law and continued federal, state and tribal commitments to the present safety net for impoverished children. Any circumlocution of this commitment may presage a crisis for Indian children in North Dakota and Indian tribes.

B. BACKGROUND OF THE POLICIES AND LAWS AFFECTING AMERICAN INDIAN CHILDREN

Indian children reflect the plight of their tribes, upon whom they rely heavily to define their rights and obligations as to the federal and state governments. The relationship between Indian tribes and the United States is a complex one borne of centuries of both conflict and reconciliation. Federal policy toward Indian tribes, and consequently Indian children, has been inconsistent throughout the two centuries that Congress has been legislating Indian affairs. Many commentators have noted that federal policy has shifted, much like a pendulum, from attempts to assimilate Indians into the non-Indian population, both economically and socially, to efforts to preserve tribal self-determination.[42] These conflicting attitudes toward Indian nations have created a somewhat schizophrenic patchwork of laws affecting Indian children.

American Indian children have been the legal targets of a multiplicity of notions and ideas promoted by policymakers with conflicting conceptions of their best interests. In the late 1800s, federal policymakers targeted Indian children as the agents of change in an era when Indian people were perceived as "savages" who needed to be rehabilitated and Christianized in order to survive in a society increasingly dominated by non-Indians.[43] Transforming Indian children was perceived as the key to Indian survival in that dominant society, and as a

41. *See* PETER FARB, MAN'S RISE TO CIVILIZATION: AS SHOWN BY THE INDIANS OF NORTH AMERICA FROM PRIMEVAL TIMES TO THE COMING OF THE INDUSTRIAL STATE 257-259 (1968).

42. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 127-206 (Michie et al. eds., 1982).

43. As the founder of one of the first boarding schools, Richard Pratt, stated in 1892: "[K]ill the Indian in him and save the man." James Brooke, *A Bid to Redefine Indian Education*, N.Y. TIMES, Nov. 27, 1995, at A10.

result they were often removed from their parents and placed in boarding schools which denied them the right to speak their native languages, practice their spiritual beliefs or adhere to their traditional grooming and attire.[44] Probably never before in this country has there been such a concerted effort to transform a group of people by legally manipulating their children.[45] Contemporary Indian children are the survivors of these policies of cultural degradation.

The pendulum has swung, however: Congress has now consciously decided that Indian tribes should determine the destiny of their own children, and it has passed several laws designed to protect this tribal prerogative.[46] This trend toward tribal self-determination came of vogue in the late 1960s and early 1970s, when Congress passed a variety of federal laws that recognized the inherent sovereign rights of Indian nations to determine their own laws and be governed by them.[47] Congress was also turning over federal programs, including social service, education and health programs impacting Indian children, directly to Indian tribes to permit them to manage them. Self-determination laws, especially the ones directly benefiting Indian children, undoubtedly promote the best interest of Indian children by permitting Indian tribes to determine the values important to Indian families and expend resources to further those values without federal and state interference.

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44. As anthropologist Peter Farb described the boarding school experience:

> The children were usually kept at boarding school for eight years during which time they were not permitted to see their parents, relatives or friends. Anything Indian–dress, language, religious practices, even outlook on life . . . was uncompromisingly prohibited. Ostensibly educated, articulate in the English language, wearing store-bought clothes, and with their hair short and their emotionalism toned down, the boarding school graduates were sent out either to make their way in a white world that did not want them, or to return to a reservation to which they were now foreign.

FARB, *supra* note 41, at 257-59.

45. One of the best examples of this is the following statement from the Commissioner of Indian Affairs who stated:

> It is admitted by most people that the adult savage is not susceptible to the influence of civilization, and we must therefore turn to his children, that they might be taught how to abandon the pathway of barbarism and walk with a sure step along the pleasant highway of Christian civilization . . . . They must be withdrawn, in their tender years, entirely from the camp and taught to eat, to sleep, to dress, to play, to work and to think after the manner of the white man.

See COMM'N IND. AFF. ANN. REP., H.R. EXEC. DOC. No. 50-1, at XIX (1888).

46. In the areas of education, child welfare, and health care, the United States government is in a current mode of encouraging tribal self-determination. The Indian Self-Determination Act is the primary vehicle by which the federal government encourages Indian tribes to contract federal programs in the areas of health care and education, as well as various other areas not impacting Indian children. *See* Indian Self-Determination Act, 25 U.S.C. § 450(n) (1994). That law permits Indian tribes to contract the various programs formerly operated by the Bureau of Indian Affairs and the Indian Health Service in Indian country.

47. Examples of these laws include the ICWA, 25 USC § 1901 (1994), and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450(a)-(n) (1994).

However, the federal government has never actually treated Indian tribes similarly to the other major semi-sovereign political entities: state governments. At the same time that Congress was promoting Indian self-determination, it was also crafting the "Great Society"–an effort to provide for the basic needs of all Americans, especially children, through a system of federal grants to state governments.[48] States were then required to use the grants to operate programs which would provide financial assistance for deprived children, medical assistance for children with medical needs, and assistance for children whose parents failed to support them despite their ability to do so.[49] For Indian children, accessing these programs is just as important as being the beneficiaries of special federal laws designed only for Indian children.[50]

Indian self-determination clashed with the basic notion underlying the implementation of the Great Society, however, and to this day Indian children suffer as a result. The federal government operated on one basic principle when it enacted the Great Society programs: The federal government could best meet the needs of impoverished children by providing grants to state governments with the directive that state government treat all children within the state equally in dispensing federal largesse.[51] In the case of Indian children, however, it was tribal governments, not state governments, who had the primary obligation to provide for reservation-domiciled Indian children. Further, because of Congress' tribal self-determination mode, state laws could have no application on Indian reservations.[52] Until the last few years, however, tribal governments were not eligible for federal funding to operate the federal entitle-

48. *See generally* William E. Nelson, *Two Models of Welfare: Private Charity Versus Public Duty*, 7 S. CAL. INTERDISCIPLINARY L.J. 295, 303-04 (1998) (discussing how the federal government "began to play a dominant role in the financing and administration of welfare" at the inception of the Great Society).

49. *Id.* at 303. The federal government "required the states, as a condition to receiving financial assistance, to cease holding family members responsible for the support of their poor relatives."

50. As the North Dakota statistics reveal, more Indian children in the state rely upon state-operated programs than tribal programs for their survival. This is largely because most of the programs designed to provide for poor children can only be operated by state governments, because they are the only legal entities entitled to receive federal dollars to operate such programs. Although the Personal Responsibility & Work Opportunity Reconciliation Act of 1996, which allows tribes to operate TANF and child support enforcement programs, changed this somewhat, that law fails to appreciate that tribal governments do not have the same resources as states to generate the fiscal matches necessary to operate many programs.

51. *See* Nelson, *supra* note 48, at 303-04.

52. An example of this is Title IV-D, the child support enforcement program which states must operate in order to receive funding under the TANF program. Although the federal courts have recognized that this program must provide for the delivery of services to Indian children, efforts to deliver these services have been stymied by the legal reality that the entities receiving the federal dollars to operate the program—state governments—have no authority to exercise jurisdiction over those absent parents in Indian country that owe the support. *See* Howe v. Ellenbecker, 8 F.3d 1258, 1263 (8th Cir. 1993).

ment programs so necessary to provide the necessities of life for children.[53]

The net result of this complicated set of conditions was that Indian children didn't receive the same federal benefits as non-Indian children. To this day, confusion reigns regarding the rights of Indian children domiciled on Indian reservations to receive federal entitlements other children have taken for granted since the 1970s. In many states, Indian children have had to adjudicate their rights to such entitlements as food stamps, AFDC,[54] medical assistance programs,[55] foster care subsidies,[56] child support enforcement services,[57] and education benefits. These court battles were not over need, as Indian children are the most impoverished class of children in the country.[58] Rather, they were jurisdictional turf battles borne of congressional neglect of clear standards for eligibility for Indian children.[59]

This confusion is primarily a product of the ambiguous relationship between Indian tribes and the United States government, and as a result between Indian tribes and individual state governments. The United States has a trust responsibility toward Indian tribes, borne of treaties and other agreements between distinct Indian nations and the federal government, whereby Indian tribes often gave up massive amounts of land and incurred much hardship in exchange for promises from the federal government.[60] The Supreme Court has described the relationship between the United States and Indian nations as "a nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character and submitting as subjects to the laws of a master."[61] This relationship explains how Congress can enact legislation in the area of Indian affairs which differs from that affecting

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53. *See* Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at scattered sections of 42 U.S.C.). This act enabled tribes to run their own TANF programs. *Id.*

54. *See generally* Heart v. Ellenbecker, 689 F. Supp. 988 (D.S.D. 1988).

55. *See generally* McNabb v. Bowen, 829 F.2d 787 (9th Cir. 1987).

56. *See generally* Native Village of Stevens v. Smith, 770 F.2d 1486 (9th Cir. 1985).

57. *See Howe*, 8 F.3d at 1260.

58. *See* FEDERAL INDIAN LAW CASEBOOK, *supra* note 9, at 15-16 (reviewing statistics showing Indians are among the most impoverished groups in the United States).

59. *See generally McNabb*, 829 F.2d at 789. As the court in *McNabb* wrote,

> We have before us an indigent Indian child, James McNabb, and his mother, Pamela, who ask us to decide who is responsible for the child's health care bills. They are the victims of a tragic paradox: the Indian Health Service (IHS) and Roosevelt County (County) do not deny responsibility for James' health care, although neither will accept it. Both the IHS and the County justify this abdication of responsibility by insisting that the other is 'primarily responsible' for the health care of indigent Indians.

Id.

60. *See* United States v. Mitchell, 463 U.S. 206, 224-28 (1983) (providing a detailed analysis of the trust responsibility doctrine and its application to Indian tribes and peoples).

61. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555 (1832).

the general population without running afoul of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[62]

The sovereign status of Indian tribes is subject to the paramount authority of the federal government over Indian affairs.[63] This authority, often referred to as plenary power, is a product of provisions in the Constitution giving Congress authority to regulate commerce with Indian tribes.[64] This provision was placed in the Constitution over the objection of several states which also wished to regulate the affairs of the Indian nations within their borders.[65] This plenary authority essentially gives Congress the fairly unlimited authority to legislate in the area of Indian affairs free of judicial review. One byproduct of this authority is that, except in limited circumstances, states are generally preempted from exercising authority in Indian country.[66] There are exceptions to this general rule, especially in states where Congress has expressly given state governments and courts the authority to apply certain state laws in Indian country.[67]

While states cannot uniformly apply their laws to Indian children domiciled in Indian country, however, Indian children remain citizens of states and are thus entitled to all the benefits offered other children, either through federally-mandated programs or under the sanction of state law.[68] For example, Indian children domiciled on Indian reservations are entitled to attend state-operated schools, receive health care in state facilities, and enjoy the benefits provided other children.[69] This is

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62. *See* Morton v. Mancari, 417 U.S. 535, 551-55 (1974).

63. *See* United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

64. *See* U.S. CONST. art. 1, § 8, cl.3.

65. *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: INDIAN TRADE AND INTERCOURSE ACTS 1-3, 43-50 (1962). The states were especially concerned that they be permitted to enter into agreements with Indian tribes to divest them of their lands, something which the United States Supreme Court later declared impossible to do. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 592-94 (1823).

66. *See* Williams v. Lee, 358 U.S. 217, 220-21 (1959).

67. The most conspicuous example of federal legislation vesting states and state courts with authority over Indian country is Public Law 280, which granted certain states mandatory jurisdiction over the reservations in their states, and gave other states the option of exercising jurisdiction. *See* Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. § 1162 (1994)). That option can only be exercised now with tribal consent as the result of an amendment to Public Law 280 in the Indian Civil Rights Act. *See* Indian Civil Rights Act, 25 USC §§ 1321-22 (1994). North Dakota is not a Public Law 280 state. However, as the result of federal legislation enacted prior to Public Law 280, the Spirit Lake reservation, formerly the Devils Lake Sioux Indian reservation, is the only reservation in North Dakota where the state can exercise criminal misdemeanor jurisdiction over offenses committed there. *See* State v. Hook, 476 N.W.2d 565, 568-69 (N.D. 1991).

68. *See Williams*, 358 U.S. at 223. The *Williams* decision, which held that state courts cannot exercise jurisdiction over consumer collection actions brought against reservation-domiciled Indians by non-Indians, has never been held to preclude the application of state laws which are beneficial to Indian children because such laws do not interfere with the rights of reservation Indians to enact their own laws and to be governed by them.

69. *Id.*

because such benefits offered by state governments do not offend the general principle that state law is inapplicable to Indians when it infringes upon the right of reservation Indians to make their own laws and to be governed by them.[70]

This right means that Indian tribes generally have broad authority to legislate in all areas impacting Indian children domiciled on Indian reservations. This includes the authority to regulate the education, religious practices, delinquency, custody[71] and support[72] of Indian children. Naturally, with five Indian tribes wholly or partially located within the state of North Dakota, this article cannot examine the laws of all five tribes governing Indian children; rather, it will highlight sections throughout.

The discussion that follows is an attempt to reconcile the various federal, state and tribal prerogatives in this unique area of the law to explain how contemporary Indian children are treated in the federal and North Dakota legal system. It focuses on three major areas: the status of American Indian children in the foster care system, Indian children's rights and access to health care, and child support enforcement services for Indian children.

III. THE INDIAN CHILD WELFARE ACT AND INDIAN CHILDREN IN THE NORTH DAKOTA FOSTER CARE SYSTEM

In a state in which an Indian child is eight times more likely to be placed in foster care placement than a non-Indian child,[73] it is surprising that North Dakota has very few reported cases regarding the application of the Indian Child Welfare Act (ICWA).[74] North Dakota has only one Supreme Court decision involving the application of the ICWA,[75] whereas South Dakota, with a similar Indian population, has thirty-one decisions from its Supreme Court discussing the application of ICWA.[76] This cannot be indicative of few Indian children being placed in foster care in the state, as the statistics defy that characterization.[77] Apparently,

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70. *Id.*

71. *See* Fisher v. District Court, 424 U.S. 382, 389 (1976) (stating tribes have primary responsibility for the welfare of Indian children domiciled on Indian reservations).

72. *See* Heart v. Ellenbecker, 689 F. Supp. 988, 989 (D.S.D. 1988). In this case the court declared that tribal law determines whether a reservation-domiciled child is deprived under the federal statutes governing eligibility for AFDC benefits and rejected the application of state law. The practical effect of the decision is to allow Indian children to receive AFDC benefits in a situation when a non-Indian child would not.

73. *See supra* text accompanying notes 35-38.

74. ICWA, 25 U.S.C. §§ 1901-63 (1994).

75. *See* B.R.T. v. Executive Director, 391 N.W.2d 594, 598-601 (N.D. 1986).

76. Search of Lexis, North Dakota & South Dakota databases (Jan. 13, 1999).

77. NORTH DAKOTA REPORT, *supra* note 5, at 7.

there have been few conflicts between Indian tribes and county social services agencies in North Dakota regarding such potentially contentious issues such as transfers of jurisdiction to tribal courts and evidentiary disputes in parental rights terminations and foster care placements. There are other issues in North Dakota, however, that touch upon the application of the Indian Child Welfare Act but which may not receive the legal attention that other issues arising under ICWA do. The following section explores some of those issues, beginning with a review of the relevant federal statutes, ICWA, Title IV-E of the Social Security Act, and the Adoption and Safe Families Act (ASFA).

A. STATUTORY BACKGROUND

Congress enacted ICWA in 1978 to curtail the mass-scale removal of Indian children from their families and tribes because of cultural ignorance and bias.[78] It also intended to prevent Indian children, who had to be removed from their families, from being deprived of contacts with their tribe.[79] Congress assumed that Indian tribes and tribal members would have more knowledge of familial and cultural ties of Indian children than non-Indian state and private social workers and court officials and thus would be more able to handle foster care placements than states.[80]

Over twenty years after that law's enactment, however, Indian children have not seen a substantial decrease in the incidence of their removal from their families. In 1996, more than half a million children were in state-run foster care.[81] Indian children are significantly over—represented in foster care, with an Indian child three times more likely to be placed in foster care or substitute care than any other child in the general population.[82] In some states, an Indian child is as much as

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78. *See* B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 395 (1997).

79. *See generally* B.J. JONES, THE INDIAN CHILD WELFARE ACT HANDBOOK (1995) (providing a thorough description of the purposes behind the Indian Child Welfare Act).

80. *See* 25 U.S.C. § 1901. In enacting ICWA, Congress found:

> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

Id. § 1901(4)-(5).

81. DONNA CRAIG & DEREK HERBERT, INSTITUTE FOR CHILDREN, THE STATE OF THE CHILDREN: AN EXAMINATION OF GOVERNMENT-RUN FOSTER CARE (1997).

82. *See generally* OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES,

sixteen times more likely than a non-Indian child to be in substitute care.[83] In North Dakota, an Indian child is eight times more likely.[84]

There are three kinds of agencies under whose authority Indian children may be in foster care: state or county governments, tribal governments, and the Bureau of Indian Affairs. Although Indian tribes have been able to tap into alternative sources of funding to pay foster care since the enactment of ICWA,[85] Title IV-E of the Social Security Act remains the primary basis for the payment of foster care subsidies for Indian children in substitute care.[86] Title IV-E is a federal matching grant program designed to reimburse states for foster care expenses.[87] Unfortunately, Indian children remain ineligible for Title IV-E foster care payments unless they are placed by a state court in substitute care or by a tribal court on a reservation which has a Title IV-E cooperative agreement with the state where that tribe is located.[88]

This deficiency has inhibited the effective implementation of the Indian Child Welfare Act in states such as North Dakota, because Indian tribes are strapped for the resources necessary to provide for children removed from Indian families both off and on Indian reservations. Many Indian tribes lack the financial wherewithal to provide foster care subsidies for their children and to provide necessary services for them, prohibiting them from transferring jurisdiction over them back to tribal court.[89] Thus, ICWA has been largely unsuccessful not because of bias and cultural ignorance but because Indian tribes have never been allowed to access the same types of funding states historically have in order to provide needed services for Indian children and their families.[90]

OPPORTUNITIES FOR ACF TO IMPROVE CHILD WELFARE SERVICES AND PROTECTIONS FOR NATIVE AMERICAN CHILDREN (1994) [hereinafter INSPECTOR GENERAL REPORT].

83. *Id.*

84. *See supra* text accompanying notes 35-38.

85. Those alternate resources include Title II of the Indian Child Welfare Act and Title IV-B of the Social Security Act. *See* Indian Child Welfare Act, 25 U.S.C. §§ 1931-32 (1994); Social Security Act, 42 U.S.C. § 628 (1994 & Supp. 1997). Title II of the Indian Child Welfare Act allows for the funding of child welfare programs in the tribal system and the application of tribal codes. 25 U.S.C. §§ 1931-32. Title IV-B of the Social Security Act authorizes direct grants to Indian tribes for the delivery of child welfare services. 42 U.S.C. § 628.

86. *See* INSPECTOR GENERAL REPORT, *supra* note 82, at 3.

87. *See* INSPECTOR GENERAL REPORT, *supra* note 82, at A-2.

88. *See* Native Village of Stevens v. Smith, 770 F.2d 1486, 1489 (9th Cir. 1985). Congressman Bill Richardson of New Mexico introduced a bill, H.R. 261, in 1997 to provide for direct federal funding to Indian tribes under Title IV-E for the provision of foster care services to Indian children. *See* H.R. 261, 105th Cong. § 1 (1997). The bill, however, never passed out of committee.

89. Two of the larger tribes in the Dakotas, the Oglala and Rosebud Sioux in South Dakota, permit South Dakota to provide the majority of child protection services on their reservations simply because they lack the resources to provide them. The Sisseton-Wahpeton Sioux Tribe operates its own Title IV-E program under an agreement with the state of South Dakota. Four of the tribes in North Dakota, Spirit Lake, Standing Rock, Turtle Mountain, and Three Affiliated Tribes, have agreements with the state regarding payment of foster and adoptive subsidies under Title IV-E. These agreements permit Indian tribal courts and child placement agencies to place Indian children in appropriate homes and facilities and have those placements paid for by the state and country under Title IV-E.

90. Title IV-E eligibility is important not only for funding, but because it triggers eligibility for

As described above, Title IV-E of the Social Security Act is a federal matching grant program designed to reimburse states for foster care, adoption assistance, and transitional independent living program payments. The number of children in foster care has increased sixty-five percent over the past ten years.[91] To address this steadily increasing foster care caseload, Congress recently passed the Adoption and Safe Families Act (ASFA) of 1997.[92] ASFA was aimed at improving the safety of children and promoting adoption or some other type of permanency for children in long-term foster care. ASFA mandates the timely placement of children in permanent homes.[93] In a nutshell, ASFA requires that any child who has been in foster care for fifteen out of the most recent twenty-two months be reviewed for termination of parental rights and freed for adoption.[94] It also permits states to forego efforts to provide reunification services to a family from which a child has been removed if the child suffered severe abuse in that home.[95]

AFSA applies to Indian children and the court systems, both tribal and state, that place Indian children in substitute care. Although there is a provision in AFSA that recognizes that it does not intend to supersede the various provisions of the Indian Child Welfare Act,[96] AFSA is very unclear on how to reconcile its provisions and those provisions in ICWA that seem to conflict. The linchpin for an application of AFSA is the utilization of Title IV-E benefits, and AFSA contains many substantive requirements to which both the social services agency and court systems must adhere in order to qualify an Indian child for Title IV-E funding.[97] For tribal courts and tribal child welfare programs accessing Title IV-E funding to pay for substitute care for Indian children, AFSA will inevitably impact the numbers of parental rights terminations and level of services provided some Indian families. While AFSA does not directly implicate children in substitute care paid for by some other source of, it may as a practical matter be unseemly for an Indian tribe to have a different set of criteria for terminating parental rights of Indian children receiving Title IV than for those not receiving such funding. Such a discrepancy in the law may lead to challenges under the equal protection

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medical and counseling services many non IV-E eligible children do not receive, since any child in Title IV-E foster care is eligible for medical assistance under Title XIX of the Social Security Act. *See* Social Security Act, 42 U.S.C. § 1396(a)(10)(A)(ii)(VIII)(cc) (1994). Access to health care for American Indian children is discussed further in part IV, *infra*.

91. *See* CRAIG & HERBERT, *supra* note 81.

92. ASFA, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

93. 42 U.S.C. § 675(5)(E).

94. *Id.*

95. 42 U.S.C. § 671(a)(15)(d)(i) (Supp. 1997).

96. *See* AFSA, 42 U.S.C. § 674(d)(4) (Supp. 1997).

97. 42 U.S.C. § 673(b) (Supp. 1997).

clause of the Indian Civil Rights Act,[98] as well as complaints from families covered by the more rigorous provisions of AFSA.

B. THE IMPORTANCE, AND DIFFICULTY, OF ACCESSING TITLE IV-E FUNDS

Accessing Title IV-E funds is one of the most critical steps a tribe can take in preserving sparse tribal foster care funds. Title IV-E money is of paramount importance to a tribe because the federal government reimburses a large portion of the foster care expenses.[99] It allows a tribe to preserve the Bureau of Indian Affairs foster care dollars and tribal monies for those foster care placements that are not eligible for IV-E funding. Further, the tribe will then be able to provide foster care services to more needy Indian children in Indian country. Finally, as an added benefit, children who receive IV-E foster care funding are also eligible for medical benefits under Title XIX of the Social Security Act.[100]

In general, an Indian child residing outside of Indian country, or an Indian child residing within Indian country and who is placed in the legal custody of a state or county child protection program, is eligible for Title IV-E funding if, at the time of removal, the child's family was eligible for Temporary Assistance for Need Families (TANF), formerly known as Aid to Families with Dependant Children or AFDC, or if the child was eligible for Supplemental Security Income (SSI). Indian children, both those residing outside Indian country and within Indian country within a state's boundaries, are considered citizens of the state in which they are residing for purposes of gaining entitlement to the various programs of the Social Security Act, including Title IV-E. Federal law requires each state which receives Title IV-E funds to provide child welfare services to all eligible children, including Indian children, in the state.[101]

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98. *See* Indian Civil Rights Act, 25 U.S.C. § 1302 (1994).

99. *See* INSPECTOR GENERAL REPORT, *supra* note 82, at A-2.

100. *See* 42 U.S.C. § 1396(a)(10)(A)(ii)(VIII)(cc). Indian children that are not Title IV-E eligible are not automatically eligible for Title XIX benefits and may be forced to rely upon Indian Health Services and its contract health program. Any foster child placed by a tribal court and who resided within an Indian Health Service health delivery area at the time of placement remains eligible for health services through the Indian Health Service notwithstanding his or her placement off a reservation. *See* Indian Health Service, 42 C.F.R. § 36.10(3) (1998).

101. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500, 520-21 (codified at 42 U.S.C. § 628 (1994)). Furthermore, the Administration for Children and Families (ACF), the agency which funds state and some tribal child welfare programs under the various titles of the Social Security Act, expects states to coordinate with tribes for the provision of services and protections to tribal children who are in state or county custody. INSPECTOR GENERAL REPORT, *supra* note 82, at 3. Failure to confer could result in the termination of benefits under Title IV-B of the Social Security Act.

Therefore, the problem regarding Indian children domiciled on Indian reservations accessing Title IV-E resources is not that they are ineligible for such services under federal law, but that they can only access those resources through the intercession of state courts or state child protection programs. An Indian child placed in the custody of a tribal child protection program by a tribal court is not, ipso facto, eligible for Title IV-E foster care subsidies, notwithstanding his family's eligibility for TANF prior to his removal.[102] This is because Congress, when it enacted Title IV-E, conditioned eligibility for foster care subsidies and other programs on placement in the custody and control of a state or county government, with no mention of tribal child welfare programs. Yet Indian tribes have the primary responsibility for protecting the welfare of Indian children on reservations.[103] They may therefore be reluctant to place their children in state or county custody, in part because of the abuses documented by Congress when it enacted ICWA.[104] In addition, state or country child protection programs may balk at honoring tribal court orders placing Indian children in their legal custody, because they are bound by certain federal regulations requiring the cooperation of the court that places the child. Tribal laws may not mirror these federal requirements, and agencies may believe they cannot comply with federal regulations when they are subject to the inconsistent dictates of tribal court orders.

The irony in this apparent congressional oversight in assuring the eligibility of Indian children placed by tribal courts for Title IV-E benefits is that Congress ostensibly addressed this issue in ICWA by assuring tribes that, for the purpose of determining eligibility for federal assistance, a tribal foster care license should be the equivalent of a state or county foster care license.[105] Theoretically, therefore, ICWA dictates that an Indian child placed in a tribally-licensed home should be eligible for Title IV-E and the corresponding Title XIX medical assistance programs and Title IV-D child support enforcement programs. This issue will be discussed further in Part III.C, *infra.*

First, however, Indian children who are transferred interstate via the Indian Child Welfare Act raise other issues regarding IV-E eligibility. In addition to ICWA, the Interstate Compact Act[106] applies to Indian

102. *See* Native Village of Stevens v. Smith, 770 F.2d 1486, 1488 n.1 (9th Cir. 1985).

103. *See* Fisher v. District Court, 424 U.S. 382, 389 (1976).

104. *See supra* note 80.

105. *See* ICWA, 25 U.S.C. § 1931(b) (1994).

106. *See* Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 326 app. (1989). The Interstate Compact on the Placement of Children "has been enacted in identical form in 49 states and the Virgin Islands." *Id.* at 293 n.1. North Dakota enacted this compact in 1963. *See* N.D. CENT. CODE § 14-13-01 (1997).

children who are transferred from state to a tribe's jurisdiction in another state for placement purposes.[107] According to the Interstate Compact Act, the transferring state will retain jurisdiction and remain financially liable for the services that the IV-E Indian child receives.[108] The receiving state, while providing the services for the Indian child, will not be financially responsible.[109] In a scenario in which an Indian child is transferred from one state to the jurisdiction of a tribal court in another state, the transferring state generally takes the position that the tribe assumes the financial responsibility for supporting the child after transfer of jurisdiction. Unfortunately, most states also take the position that a child transferred into their state under the dictates of ICWA is not their responsibility, citing the Interstate Compact Act. These interpretations of federal law again put the onus on Indian tribes to provide financial resources for Indian children transferred back to their jurisdiction. Of course, tribes and states can regulate this by a cooperative agreement, but receiving states appear reluctant to accept financial responsibility for all Indian children transferred to the tribe's jurisdiction under ICWA.

Even when the IV-E Indian child is transferred from state to tribe within the same state, the child only remains eligible to receive IV-E foster care services if the receiving tribe has a IV-E cooperative agreement with the state or if the state chooses to remain liable for the services.[110] Thus, an Indian child who is transferred from a tribe with a IV-E cooperative agreement to a IV-E facility in the state in which the tribe is located will continue to be eligible for IV-E services. In contrast, if a IV-E Indian child is transferred from a tribe which has no IV-E cooperative agreement with the state in which the tribe is located, the Indian child will receive IV-E services only if the state is granted and accepts custody of the Indian child.[111] This practice forces the tribe to relinquish custody of the Indian child to the state to enable the child to receive Title IV-E services.

C. COOPERATIVE AGREEMENTS

To help alleviate some of these problems, tribes are mandated to enter into cooperative agreements with the state in which the tribe is located in order for their children to receive Title IV-E funding. However, legislation neither requires nor encourages states to share Title IV-E funds with tribes. Federal legislation was introduced to allow

107. Hartfield, *supra* note 106, at 299.
108. Hartfield, *supra* note 106, at 299.
109. Hartfield, *supra* note 106, at 299.
110. Hartfield, *supra* note 106, at 299.
111. Hartfield, *supra* note 106, at 299.

eligible Indian children placed by a tribal court to receive Title IV-E benefits, but that legislation proved unsuccessful.[112]

In *Native Village of Stevens v. Smith*,[113] an Alaskan native village sued the governor of Alaska after the state refused to pay for the foster care maintenance of a child placed by the tribe.[114] The tribe sought a declaratory judgment that tribally-licensed foster homes were equivalent to state licensed foster homes for the purposes of receiving Title IV-E funding.[115] The tribe argued that it had unsuccessfully attempted to negotiate a cooperative agreement with Alaska.[116] Further, the tribe stated that federal law mandated Alaska to enter into such an agreement.[117] The court held that while the spirit to undertake such an agreement was consonant with the statutes, federal law did not actually require Alaska to enter into an agreement with the tribe concerning foster care.[118] The court further held that if no agreement existed, the tribe was not entitled to federal foster care reimbursement for the placement of the Indian child.[119]

To date, few tribal/state cooperative agreements exist. In many cases, tribes and states must circumnavigate longstanding points of contention such as tribal sovereignty, comity, jurisdiction and land disputes.[120] ICWA encourages agreements between states and tribes regarding the care of Indian children by providing a legal mechanism for states and tribes to enter into agreements regarding jurisdiction and other issues.[121] However, because Title IV-E is a program governed by federal regulations to which states must adhere in order to access funding, most states suggest that the funding agreement should be contingent upon a tribe's adoption of the policies and procedures of the state child welfare agency.[122] Otherwise, states may be hesitant to enter into such cooperative agreements with tribes, since they put states at financial peril should the tribe's use of Title IV-E funds violate federal regulations.[123]

States may also hesitate to enter into cooperative agreements with Indian tribes to subsidize child welfare programs because Title IV-E requires matching funds that usually come from state taxpayers, while

112. *See supra* note 88.
113. 770 F.2d 1486 (9th Cir. 1985).
114. Native Village of Stevens v. Smith, 770 F.2d 1486, 1487 (9th Cir. 1985).
115. *Id.*
116. *Id.* at 1489.
117. *See id.*
118. *Id.*
119. *Id.*
120. *See* INSPECTOR GENERAL REPORT, *supra* note 82, at 6.
121. *See* ICWA, 25 U.S.C. § 1919 (1994).
122. *Id.*
123. *See* INSPECTOR GENERAL REPORT, *supra* note 82, at 6.

tribes generally lack the tax base to provide matches for social service programs.[124] Another potential obstacle for tribes whose territory crosses state lines, such as the Standing Rock Sioux Tribe, is that they would have to enter into separate cooperative agreements with both North and South Dakota, which may vary depending upon the requests of each of those states.

Many of these issues will remain unresolved unless legislation is passed which allows tribes to receive Title IV-E funding directly, much in the way tribes can now access federal dollars to operate TANF and the food stamp program.[125] Of course, just as with the TANF program, in which the requirement of a tribal match proved to be too great an obstacle for most tribes to meet, the same quandary will confront Indian tribes in the foster care arena. Whether or not the federal government will provide all of the funding for Indian tribes, either long-term or on an interim basis, and whether states, which must meet the match requirement, will object to such a dual standard, remain to be seen.

However, until such legislation is passed, tribes and states must work together to ensure that Indian children who reside in Indian country receive Title IV-E foster care funding. Tribes must work to educate themselves regarding the requirements of Title IV-E foster care funding. This means tribal courts must become familiar with the mandatory language that must be in tribal court orders placing Indian children in foster care.

IV. HEALTH CARE FOR INDIAN CHILDREN

This section will explore the laws that govern health care for Indian children. This topic is fraught with longstanding controversy and bitterness for Indian people. Despite the fact that the traditional health care system of indigenous peoples in the Americas was a "sophisticated" one, "[Native people] succumbed to the onslaught of Old World diseases. Never in human history have so many new and virulent diseases hit any one people all at one time."[126] Hundreds of thousands of native people succumbed to such diseases as small pox, rubella and venereal diseases, often infected by provisions delivered to

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124. *See* FEDERAL INDIAN LAW CASEBOOK, *supra* note 9, at 15-16 (reviewing statistics on Indian poverty).

125. *See* Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at scattered sections of 42 U.S.C.).

126. *See* JACK WEATHERFORD, INDIAN GIVERS: HOW THE INDIANS OF THE AMERICAS TRANSFORMED THE WORLD 183-84, 187, 193 (1988).

them by the United States government.[127] This history makes the issue of health care for American Indians an especially sensitive one.

Several courts have recognized that the United States government has a trust responsibility to provide for the health care of Indian persons, including Indian children.[128] The first federal recognition of this responsibility was the passage of the Snyder Act in 1921.[129] The Act authorized the appropriation of funds for the "relief of distress and conservation of health . . . of Indian nations throughout the United States."[130] Although the Snyder Act does not speak in terms of entitlements to such services, the United States Supreme Court has recognized it conveys a "trust responsibility" to pay for certain necessities of Indian life.[131]

Prior to 1955, responsibility for the health care of Indian children was with the Bureau of Indian Affairs, and by most accounts it performed miserably. Infant mortality rates were abhorrent,[132] often times three times the national average, and Indian children were inflicted with diseases such as tuberculosis and other treatable diseases at a disproportionate rate.[133] In 1955, responsibility for the health care of Indians was transferred to the Public Health Service which until quite recently was a branch of the Department of Health and Human Services. The Indian Health Service was created as a part of the Public Health Service to deal specifically with the health needs of Indians, including children.[134]

Federal responsibility for Indian health care was reaffirmed by the Indian Health Care Improvement Act of 1976[135] and subsequent amendments to that law.[136] The Indian Health Care Improvement Act (IHCIA) appears to be an explicit recognition by Congress that assuring health care for American Indians is a part of the federal trust responsibility to

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127. *Id.*

128. *See* McNabb v. Bowen, 829 F.2d 787, 791-92 (9th Cir. 1987); White v. Califano, 437 F. Supp. 543, 555 (D.S.D. 1977), *aff'd per curiam*, 581 F.2d 697 (8th Cir. 1978).

129. Snyder Act, ch. 115, 42 Stat. 208 (1921) (codified as amended at 25 U.S.C. § 13 (1994)).

130. *Id*

131. *See* Morton v. Ruiz, 415 U.S. 199, 236 (1974). Although Morton did not expressly declare that the Snyder Act created a trust responsibility to Indian tribes, it did declare that it creates an obligation to deal fairly and openly with Indian tribes in determining expenditures. *Id.*

132. The infant mortality rate for Indian children in 1955 when the BIA was stripped of authority over Indian health issues was 62.7 per 1,000 births compared to 26.4 in the national average. FEDERAL INDIAN LAW CASEBOOK, *supra* note 9, at 17.

133. Even today an Indian child is five times as likely to be inflicted with tuberculosis as other children. FEDERAL INDIAN LAW CASEBOOK, *supra* note 9, at 17.

134. There has recently been a shakeup in the structure of the Department of Health and Human Services and now IHS is now an operating division of the DHHS. *See* Statement of Organization, 60 Fed. Reg. 56,605-06 (Dep't Health & Human Servs. 1995) (functions & delegations of auth.).

135. *See* Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, 90 Stat. 1400 (codified as amended in scattered sections of 25 U.S.C.).

136. *See* Indian Health Care Improvement Act of 1992, Pub. L. No. 102-573, 106 Stat. 4526 (codified as amended at scattered sections of 25 U.S.C.).

Indian tribes. In the language of the IHCIA itself, Congress declares that in order to fulfill its "special responsibilities and legal obligation to the American Indian people," the nation's policy is "to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all resources necessary to effect that policy."[137]

Many Indian tribes have capitalized on the opportunities presented by the Indian Self-Determination and Education Assistance Act of 1975[138] and contracted federal health care programs. As of March of 1996, Indian tribes and Alaskan native corporations administered 12 hospitals, 116 health centers, 3 school health centers, 56 health stations, and 167 Alaskan village clinics.[139] Meanwhile, the Indian Health Service itself operates 37 hospitals, 64 health centers, 50 health stations, and 5 school health centers. [140]

The key issue involved in an examination of the rights of Indian children to health care services is the interaction between federal laws applicable solely to Indian health care and more general laws controlling health care for the entire population. Reservation and near-reservation[141] domiciled Indian children, as well as non-Indian children of Indian parents,[142] are entitled to receive free medical services through the Indian

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137. Indian Health Care Improvement Act, 25 U.S.C. § 1602 (1994).

138. Indian Self-Determination & Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2206 (1974) (codified as amended in scattered sections of 5 U.S.C. & 25 U.S.C.). This law permits Indian tribes, and in some cases urban Indian organizations, to operate federal programs previously operated by the Bureau of Indian Affairs and Indian Health Service through contracts with those agencies. *Id.*

139. *See* Indian Health Services Home Page (visited June 13, 1999) <http://www.ihs.gov/AboutIHS>.

140. *Id.*

141. In the health care delivery system created by Congress for Indian children, the term "near-reservation" has great significance, as Indian tribes are permitted to designate areas that border their reservations as "near-reservation" areas where resident tribal members can receive the same level of health care benefits as reservation residents. *See, e.g.*, 25 C.F.R. § 900.8 (1998) (authorizing Indian tribes to designate the service area they intend to serve when operating health care programs under the Indian Self-Determination Act). The criteria for determining what is a near reservation area are those areas close to the reservation boundaries which can reasonably be considered part of the reservation service area, based on consideration of the following factors:

> (1) The number of persons residing in the off-reservation area who would be eligible under section 36.12(a)(1) & (3).
> (2) The number of persons residing in the off-reservation area who have traditionally received health services from the Indian Health Service and whose eligibility for services would be affected;
> (3) The geographic proximity of the off-reservation area to the reservation; and
> (4) Whether the Indians residing in the off-reservation area can be expected to need and to use health services provided by the Indian Health Service given the alternate resources (health facilities and payment sources) available and accessible to them.

Indian Health Service, 42 C.F.R. § 36.15 (1998).

142. *See* Indian Health Service, 42 C.F.R. § 36.12(a)(3) (1998). This is one exception to the general requirement that services to Indians is based upon membership in an Indian tribe.

Health Services, an agency of the Department of Health and Human Services.[143] Indian foster children placed by Indian tribal courts away from reservations or near-reservation areas are also eligible for medical services through the Indian Health Service.[144] This eligibility is without regard to the financial ability of the child or his or her parent or guardian to pay.[145] This is unlike other medical assistance programs such as Title XIX of the Social Security Act and county poor relief provisions, which are generally directly tied to the ability of a child and his legally responsible guardian to pay for medical services. As a practical matter, an Indian child or the non-Indian child of an Indian parent who has ever resided within a "Health Service Delivery area" of the Indian Health Service can go to any hospital or medical clinic operated by the Public Health Service, the Indian Health Service, or an Indian tribe and receive free medical services.[146]

The issue is more complicated when the child wishes to have the Indian Health Service pay for medical services given by another provider. In this case, the child must meet residency requirements and satisfy the other, more stringent requirements governing Indian Health Services contract health care.[147] As few reservations have hospitals and clinics that provide the full panoply of medical services needed by Indian children, contract health services are a vital ingredient in the effort to provide decent health care for Indian children. The Indian Health Service, however, historically has represented its contract health program as a payor of last resort with regard to services that cannot be obtained by Indian children directly at Public Health Service Hospitals located on many reservations or at Indian Health Service clinics located on reservations or in urban areas where a substantial number of Indians reside. These hospitals and clinics are operated either by the Indian

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143. Other children not residing on the reservation or near reservation area would be eligible for such services also under the definition of resident which includes:

> (1) Students who are temporarily absent from the Health Service Delivery Area during full time attendance at programs of vocational, technical, or academic education including normal school breaks;
>
> (2) Persons who are temporarily absent from the Health Service Delivery Area for purposes of travel or employment (such as seasonal or migratory workers).

See Indian Health Service, 42 C.F.R. § 36.10 (1998).

144. *See* Indian Health Service, 42 C.F.R. § 36.10(3) (1998).

145. The irrelevancy of an Indian child's need in determining whether the Indian Health Service has an obligation to provide services to the child, combined with the alternate resource rule discussed herein, creates the anomalous situation where often Indian children who are not impoverished are more likely to be eligible for Indian Health Services than impoverished children who are more likely to be eligible for some other type of state or local medical assistance.

146. *See* Indian Health Service, 42 C.F.R. § 36.12(b)(1) (1998). Indians can even utilize medical facilities, such as the Walter Reed Public Health Service Hospital in Washington D.C., often thought to be the exclusive province of elected officials.

147. *See* Indian Health Service, 42 C.F.R. § 36.12 (1998).

Health Service directly or by tribes, or consortia of tribes, pursuant to contracts made under the Indian Self-Determination Act.[148] For those services that cannot be obtained directly at one of those facilities, the Indian Health Services operates a contract health program whereby the IHS will pay medical care providers for services delivered to Indian children.[149]

As the foregoing discussion shows, the Indian Health Service theoretically provides a level of medical services to Indian children necessary to sustain their well being. However, funding for the Indian Health Service has always operated on the premise that IHS is a payor of last resort.[150] This is an often misunderstood concept, and one which has led to Indian children being denied medical services by the Indian Health Services and the other primary source of medical services for impoverished children, Title XIX of the Social Security Act. Because both IHS contract health services and Medicaid purport to be payors of last resort for medical services, questions frequently arise regarding the responsibility of each to pay for services received by Indian children. There is generally no problem when Indian children have medical problems treatable at the various hospitals and clinics operated by the Indian Health Service or by tribes under contracts with the Indian Health Service. Such hospitals generally provide care regardless of the child's eligibility for Medicaid or other private insurance, and they attempt to gain reimbursement from the responsible entity later.

When the child cannot be treated at the clinic or hospital, however, and is referred for treatment elsewhere under the contract health program of IHS or presents himself at another facility because of an emergency, problems have arisen regarding the responsibility of IHS to pay for such services. IHS has often taken the position that the Indian child needs to apply for other medical assistance programs, including Title XIX, before IHS will consider payment.[151] This is true notwithstanding the referral to the medical provider by an IHS facility or the child's

148. *See id.*

149. The IHS defines contract health care as: "Contract health services means health services provided at the expense of the Indian Health Service from public or private medical or hospital facilities other than those of the Service or those funded by the service." 42 C.F.R. § 36.10.

150. This has frequently led to situations in which IHS has been severely underfunded and frequently expends its contract health monies before the expiration of a fiscal year. This results in IHS, on many occasions denying payment on a legitimate bill because it had simply ran out of money for the year. Sometimes, these bills would be paid out of the next fiscal year's appropriation but more often than not the bills would not be paid resulting in lawsuits against the Indian child's family.

151. *See* McNabb v. Bowen, 829 F.2d 787, 789 (9th Cir. 1987) (reviewing IHS's "alternate resource" rule).

eligibility for contract health service because of his/her domicile on or near an Indian reservation.[152]

Further, although courts have found that the delivery of health services to Indian children related to the United States' trust responsibility to Indian tribes, no court has found that the United States has an obligation, independent of a specific federal statute, to provide health care for Indian children.[153] This leaves the provision of health care to Indian children in a somewhat precarious situation, and also increases the complexity of the interrelationship between Indian Health Services and other medical assistance programs such as Medicaid. If the Indian Health Service is a medical provider of last resort to Indian children, do Indian children have to exhaust all possible avenues of other federal, state and country relief before seeking payment from IHS for medical services delivered? This issue was the subject of federal litigation in *McNabb v. Bowen*,[154] wherein the court was confronted with the question of which entity—the Indian Health Services or a Montana county poor relief program—was responsible for the medical services provided an indigent Indian child. The district court had concluded that the Indian Health Services' rule denying Indian children contract health services if county and state medical services could be accessed was inconsistent with the role of Indian Health Services to provide services to Indian children "in the first instance."[155]

The Ninth Circuit disagreed with this conclusion, finding that the Indian Health Service could deny services to an Indian child based upon the availability of alternate resources through state or county programs.[156] The court concluded that nothing in the trust responsibility doctrine or federal law and regulations compelled the Indian Health Service to be the primary source of medical benefits for Indian children.[157] Indeed, the Indian Health Services could legitimately include state and country medical service providers as alternate service providers without running afoul of congressional intent as reflected in the Snyder Act and subsequent federal statutes governing the Indian Health Service.[158] The Ninth Circuit went on, however, to conclude that

152. *Cf.* Indian Health Service, 42 C.F.R. § 36.15 (1998) (listing the factors that may be used when determining whether a "near reservation" area is close enough to the reservation boundaries to be considered part of the reservation service area). One exception is for Indian children placed in foster homes by tribal courts who would remain eligible for IHS contract health services notwithstanding their residence. *See* Indian Health Service, 42 C.F.R. § 36.10(3) (1998).

153. *See* Lincoln v. Vigil, 508 U.S. 182, 194-95 (1993).

154. 829 F.2d 787 (9th Cir. 1987).

155. McNabb v. Heckler, 628 F. Supp 544, 549 (D. Mont. 1986).

156. McNabb v. Bowen, 829 F.2d 787, 793-94 (9th Cir. 1987).

157. *Id.* at 792.

158. *Id.* at 792-93.

the county's refusal to pay for the services delivered to the Indian child therein prevented the IHS from concluding that the alternate resource was "available" to the child.[159] The Indian Health Service was obligated, according to the court, either to provide services to the child or provide advocacy for the mother in obtaining alternate resources.[160] Having failed to do so, the Court held, the Indian Health Service was responsible for the child's health services.[161]

The decision in *McNabb* that the Indian Health Service could deny services to Indian children based upon alternate resources is strongly indicative that the court did not believe that the provision of health care to Indian children is a treaty or trust obligation to Indian tribes. The United States Supreme Court similarly viewed the trust responsibility argument dimly in *Lincoln v. Vigil.*[162] *Lincoln* involved a challenge to the Indian Health Service's decision to terminate a program which provided diagnostic and treatment services to Indian children with handicaps in the southwestern part of the United States.[163] The program was never expressly authorized by Congress, but the Indian Health Service had continually provided money out of its lump sum appropriation to provide services for Indian children with handicaps.[164] The Tenth Circuit Court of Appeals found that the United States' trust responsibility to the litigants in *Lincoln* prevented the IHS from discontinuing the program without express acquiescence by Congress.[165]

On appeal, however, the United States Supreme Court summarily rejected the trust responsibility argument: "Whatever the contours of [the trust] relationship . . . it could not limit the Service's discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide."[166] This language strongly suggests the Court considered itself to have very limited authority to second guess decisions of the federal government to expend its resources on native people in any manner it sees fit. This may prove to be an ominous harbinger for native children when financial resources for medical care become scarce.

The Indian Health Service provides an important safety net for Indian children with medical needs. It is not, and was never designed to

159. *Id.* at 793-94. This is somewhat of an odd holding in light of the court's pronouncement in its recitation of the facts that the county in question approved the expenditure of country resources for the child's medical services after an administrative appeal. *Id.* at 789.

160. *Id.* at 793-94.

161. *Id.*

162. 508 U.S. 182 (1993).

163. Lincoln v. Vigil, 508 U.S. 182, 189 (1993).

164. *Id.* at 186.

165. *See* Vigil v. Rhodes, 953 F.2d 1225, 1230-1231 (10th Cir. 1992).

166. *Lincoln*, 508 U.S. at 195.

be, a viable substitute for the Title XIX medical assistance program, the principal source of medical insurance for impoverished and disabled children. Indian children have been discriminated against with regard to their eligibility for Title XIX medical assistance, however, because that assistance is often tied to the eligibility for other federal benefits such as TANF and foster care subsidies. If Congress levels the playing field for Indian tribes under these programs, the medical assistance program should also fall in line, and medical care for native children should become more secure than it currently is.

V. CHILD SUPPORT ENFORCEMENT AND INDIAN CHILDREN

With a substantial number of Indian children residing in single-parent homes and in substitute care, the need for child support enforcement services for Indian children is manifest.[167] These services, especially paternity establishment, are even more consequential for Indian children because application of other laws discussed in this article, including the ICWA and eligibility for health services, is tied directly to a child's membership in an Indian tribe. When an Indian child cannot establish a legal relationship with his or her natural father because of jurisdictional ambiguity or the lack of a coordinated approach to child support enforcement for Indian children, that child may lose not only the ability to gain support from a natural parent, but he or she also may be precluded from becoming a member of his or her tribe. This inability affects the Indian children of today and the future and threatens the future survival of Indian tribes as markedly as the practices of state and private agencies in removing Indian children from their homes.

The discussion that follows will provide an overview of Title IV-D of the Social Security Act and the services it provides to custodial parents and their children. It will also review some of the many court decisions concluding that Indian tribes, and not state governments, have the inherent authority to determine what domestic relations laws will govern Indian families on, and sometimes off, reservations. These decisions have created a jurisdictional anomaly for state child support agencies wishing to provide child support collection services for Indian children because they foreclose the possibility of the application of state laws mandated by federal regulations to Indian reservations. Lastly, this section examines the possibilities extended both tribes and states in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

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167. *See* NORTH DAKOTA REPORT, *supra* note 5, at 3, 7 (reviewing demographic statistics for Indian children).

Prior to 1975, there was no coordinated federal approach to child support collection efforts, primarily because the majority of children receiving Aid to Families with Dependent Children did so because of the death or disability of a parent. In 1975, Congress realized that more children were receiving welfare because of abandonment by a natural parent and consequently enacted the Child Support Enforcement and Paternity Establishment Program as part of Title IV-D of the Social Security Act.[168] That act authorized federal matching funds for use in enforcing support obligations by locating absent parents, establishing paternity, establishing child support awards, and collecting support.[169]

The 1975 act left basic responsibility for administering child support enforcement programs with the states, but it also imposed mandates upon states wishing to remain eligible for matching funds.[170] Under the mandates, certain children, including those receiving TANF benefits, Title IV-E benefits, and medical benefits under Title XIX of the Social Security Act, are automatically eligible to receive child support collection services, while other children not automatically eligible (non-AFDC families) can receive services for a nominal fee by applying.[171]

Congress also passed the Child Support Enforcement Amendments of 1984, which require all states seeking federal monies to establish child support guidelines.[172] While the 1984 laws were merely advisory, key provisions were strengthened by the Family Support Act of 1988.[173] The Family Support Act required states to have uniform support guidelines but did not set the particular guidelines.[174] The 1988 Act also stated that "support guidelines must serve as rebuttable presumptions in all cases in which a child support order is established."[175]

In 1989, the Office of Child Support Enforcement enacted a regulation which unwittingly resulted in almost the complete evaporation of all state coordinated child support collection efforts in Indian country.[176] That regulation required any state IV-D agency entering into a cooperative agreement with any other entity for the enforcement

168. *See* Child Support Enforcement Act, Pub. L. No. 93-647, Stat. 2351, 2351-58 (1974) (codified at 42 U.S.C. §§ 651-60 (1994 & Supp. 1996)).

169. *See generally* Catherine V. Piersol, *Child Support Enforcement in South Dakota: A Practitioner's Guide*, 40 S.D. L. REV. 393 (1995) (providing an excellent discussion of the federal child support enforcement initiatives and how they have failed in Indian country).

170. *Supra* note 168.

171. *See* Child Support Enforcement Act, 42 U.S.C. § 654(4)(A)(i) (Supp. 1996).

172. Child Support Enforcement Amendments of 1984, Pub. L. 98-378, 98 Stat. 1321-22 (codified as amended at 42 U.S.C. § 667 (1994)).

173. Family Support Act of 1988, 42 U.S.C. § 667(b)(2) (1994).

174. Family Support Act of 1988, 42 U.S.C. § 667 (1994).

175. 42 U.S.C. § 667(b)(2).

176. *See* 45 C.F.R. § 302.34 (1998).

of child support obligations to assure that the contracting entity complied with all provisions of Title IV-D.[177] Prior to the enactment of that regulation, many state child support agencies provided services for Indian children through tribal courts by filing and prosecuting child support matters through tribal courts utilizing tribal laws.[178] The costs for those services were routinely partially paid by the federal government under the financial participation regulations governing Title IV-D.[179]

When the new regulation took effect, many of the state initiatives halted; the new regulation prohibited federal financial participation funds for efforts undertaken in a tribal forum pursuant to tribal law because few, if any, tribes had enacted child support enforcement laws which complied with federal law and regulations. The tribal laws were deficient in numerous areas, most notably because they lacked a statute of limitations for paternity establishment[180] and use of genetic testing;[181] a requirement that statutory or judicial child support guidelines guide a judge's determination of support;[182] mandatory wage withholding for support[183] and numerous other areas.

Litigation undertaken in some states challenging the lack of services, led to judicial decrees requiring certain states to make all good faith efforts to enter into cooperative agreements with Indian tribes for the delivery of services.[184] Nevertheless, the principal handicap for both tribes and states continued to be federal regulations governing cooperative agreements. These regulations, which seemed to compel Indian tribes to enact laws that conformed to federal regulations before the state could provide services, provided little incentive for Indian tribes, as they were not eligible for funding under Title IV-D. While states were enticed to enact laws and regulations on child support enforcement in order to access federal dollars, tribes could not access federal money be enacting conforming laws because they were not recognized as governments eligible for Title IV-D funding.

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177. *Id.*

178. *See* Howe v. Ellenbecker, 774 F. Supp. 1224, 1228 (D.S.D. 1991) (providing a description of how that process worked on the Standing Rock Sioux Indian reservation).

179. *See* 45 C.F.R. § 304.21 (1998).

180. Federal law requires states to have eighteen-year statutes of limitations for paternity actions, which many tribes did not, and still do not have in their codes. *See* 42 U.S.C. § 666(a)(5)(A) (Supp. 1996).

181. 42 U.S.C. § 666(a)(5)(B) (Supp. 1996).

182. 42 USC 666(a)(10) (Supp. 1996).

183. 42 U.S.C. § 666(a)(8)(B) (Supp. 1996).

184. *See generally* Howe v. Ellenbecker, 796 F. Supp. 1276 (D.S.D. 1992), *aff'd* 8 F.3d 1258 (8th Cir. 1993).

One possible solution to this problem, exercising state jurisdiction over child support enforcement matters arising within Indian country, also failed. The United States Supreme Court in *Fisher v. District Court*[185] recognized that Indian tribes have the exclusive authority to regulate the domestic relations affairs among both member and non-member Indians arising within Indian country.[186] Although this case involved an adoption proceeding, numerous federal and state courts have utilized *Fisher* to preclude the exercise of state court jurisdiction over domestic relations matters arising within, and sometimes even outside, Indian country.[187]

For example, state courts have been loathe to exercise jurisdiction over paternity establishment actions involving Indian children or putative parents residing in Indian country. Numerous state courts have held that the exercise of such jurisdiction would unduly interfere with the inherent rights of Indian tribes to make their own laws and to be governed by them.[188] Other courts have held that state courts cannot enforce child support orders against reservation-domiciled child support obligors, even if the state court had original jurisdiction to enter the child support order. There have been a wealth of other state court decisions addressing issues that arise in the context of enforcing child support orders in Indian country, with the majority holding that if the enforcement action is against a person or asset on reservation, tribal law governs, but if the action is against an off-reservation person or asset, state law can control.[189]

Even states governed by Public Law 280, which gives some states jurisdiction over reservations located in the state, have been less than productive in collecting child support for Indian children.[190] One state court has held that Public Law 280 did not grant state courts jurisdiction over actions to collect debts owed by absent parents to states because of the receipt by a child of welfare benefits.[191] Other states have sharply disagreed with this and concluded that such actions are private actions

185. 424 U.S. 382 (1976).

186. Fisher v. District Court, 424 U.S. 382, 389 (1976).

187. The North Dakota Supreme Court, for example, has taken the position that tribal courts have exclusive jurisdiction over actions brought to establish the paternity of a minor Indian child when the child is alleged to have been conceived in Indian country, notwithstanding contacts off the reservation. *See In re* M.L.M., 529 N.W.2d 184, 185 (N.D. 1995); McKenzie County Soc. Servs. Bd. v. V.G., 392 N.W.2d 399, 402 (N.D. 1986).

188. *See* Jackson County v. Swayney, 352 S.E.2d 413, 418-19 (N.C. 1987).

189. *See* First v. State, 808 P.2d 467, 472 (Mont. 1991) (holding that state unemployment benefits owed a reservation-domiciled Indian can be garnished to collect child support). *See also* State *ex. rel.* Vega v. Medina, 549 N.W.2d 507, 509-10 (Iowa 1996).

190. *See supra* note 67.

191. *See* State *ex rel* Department of Human Servs v. Whitebreast, 409 N.W.2d 460, 464 (Iowa 1987).

over which certain states were granted jurisdiction by the enactment of Public Law 280.[192] Even in those states, however, attempts to collect child support from tribal entities have been unsuccessful because Public Law 280 expressly does not give state courts jurisdiction over Indian tribes, nor does it permit suits against tribal entities in state courts.[193]

In North Dakota, there have been recent attempts by the state to surmount the difficulties that arise when a state agency is charged with collecting support from a reservation-domiciled Indian parent. The state has solicited tribal support for amendments to tribal law to gain substantial compliance with the federal regulations binding the state in collecting child support from absent parents.[194] North Dakota also received a federal grant in 1997 allowing it to work with tribal governments to attempt to achieve tribal compliance with federal law and regulations which would permit the state and tribes to attain cooperative agreements on the collection of child support on Indian reservations.[195] Much of this momentum was perhaps the result of a federal lawsuit filed by custodial parents of Indian children against the Director of the North Dakota Department of Human Services, claiming that they had been denied services in violation of Title IV-D.[196]

Recent amendments to Title IV-D of the Social Security Act also provide hope for Indian children seeking child support enforcement services provided through the mandates of federal law. Section 375 of the Personal Responsibility and Work Opportunities Act amended 42 U.S.C. § 654(33), eliminating the requirement that an Indian tribe agree to comply with all federal regulations governing Title IV-D before becoming eligible for a cooperative agreement with a state IV-D entity.[197] Instead, a tribe is eligible if it "has an established tribal court

192. *See* Becker County Welfare Dep't v. Bellcourt, 453 N.W.2d 543, 544 (Minn. Ct. App. 1990).

193. *See* Gavle v. Little Six, Inc., 555 N.W.2d 284, 289 (Minn. 1996).

194. A recent Action Transmittal from the Administration for Children and Families in the Department of Health and Human Services dated July 28, 1998 reveals that that office now takes the position that an Indian tribe need not comply en toto with federal law and regulations to become eligible for a cooperative agreement with a State Office of Child Support Enforcement. That action transmittal, a copy of which is with the author, takes the position that the 1996 amendment to Title IV-D of the Social Security Act. *See* Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2256 (codified as amended at 42 U.S.C. § 654(33) (Supp. 1996)). There were also technical amendments to this law made by Section 5546 of the Balanced Budget Act of 1997.

195. That grant was then sub-granted to the Northern Plains Tribal Judicial Training Institute at the University of North Dakota School of Law which has been working with four tribes in North Dakota on the development of tribal codes that comply with Title IV-D regulations.

196. *See* Lockwood v. Wessman, Civil No. A4-94-2 (D.N.D. 1994). This case was filed in 1994 by custodial parents of Indian children claiming that the state was denying them Title IV-D services in violation of federal law. *Id.* Eventually, the court directed the state to attempt to enter into cooperative agreements with the tribes in North Dakota as a remedy. *Id.*

197. 42 U.S.C. § 654(33) (Supp. 1997).

system or Court of Indian Offenses with the authority to establish paternity, establish, modify or enforce support orders or to enter support orders in accordance with child support guidelines established or adopted by such tribal entity."[198] Most Indian tribes with tribal courts, and all the tribes in North Dakota, meet these general criteria, rendering them eligible for cooperative agreements with the state.[199]

Another option for tribes is available in a 1996 amendment to Title IV-D. That amendment, codified at 42 U.S.C. § 655(f), requires the Secretary of Health and Human Services to publish regulations regarding the direct funding of tribal child support enforcement programs after extensive consultation with Indian tribes.[200] Such consultations have occurred, and a draft of those regulations has been circulated by the Native American office of the Office of Child Support Enforcement.[201] This approach is perhaps preferable for Indian tribes who have a history of working with the federal government on subsidizing programs for native youth, and this tribal-federal relationship is a product of the federal trust responsibility.

Amendments to Title IV-D, and the aforementioned amendments to Title IV-A of the Social Security Act governing TANF eligibility which elevate tribes to the same status as states in the implementation of the federal entitlement programs, will hopefully lay the groundwork for amendments to Title IV-E. As a result, Indian tribes hopefully will finally be able to avail themselves of the same resources as state governments in providing for children within their jurisdictions. This is ultimately perhaps the only method of obviating the jurisdictional problems which have prevented Indian children from accessing the same level of services and benefits as off-reservation children have received and will also assuage state concerns over inability to provide services within Indian country.

VI. CONCLUSION

Indian children are unique in the American legal system. They are subjected to more layers of legal subtleties in the legal system than other children, yet somehow they appear to have lost some of the fundamental protections federal and state law guarantees other children. Overcoming

198. Pub. L. No. 104-193, 110 Stat. at 2256 (codified as amended at 42 U.S.C. § 654(33)). There were also technical amendments to this law made by Section 5546 of the Balanced Budget Act of 1997.

199. The only deficiency in tribal law may be that the tribes, in general, do not have child support guidelines. This weakness needs to be addressed among all the tribes in North Dakota.

200. 42 U.S.C. § 655(f) (Supp. 1997).

201. Copy with author.

the many obstacles that confront Indian children who seek the protection of the law for their staples of life is a challenge to federal, state and tribal governments. Future generations of Indian children will be the measuring stick by which the success of intergovernmental cooperation is gauged.